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October Term, 1991

THE MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, et al.,
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., et al.,
Respondents.

CORRECTED COPY

On Writs of Certiorari to the
United States Court of Appeals for
The First Circuit

BRIEF OF AMICI CURIAE STATES OF MASSACHUSETTS, MICHIGAN, MINNESOTA, AND NEW JERSEY IN SUPPORT OF PETITIONERS

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ISSUE PRESENTED

Does the National Labor Relations Act clearly express an intent to preempt States and their subdivisions from using project labor agreements on their own public works projects even though Congress expressly authorized such agreements for the private construction industry?

UNITED STATES SUPREME COURT

Nos. 91-261, 91-274

THE MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, ET AL.

Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/ RHODE ISLAND, INC., ET AL.,

Respondents.

BRIEF OF AMICI CURIAE STATES OF MASSACHUSETTS, MINNESOTA, NEW JERSEY

IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

The States identified above submit this brief amici curiae to urge the Court to reverse the decision of the First Circuit. This brief emphasizes the practical difficulties and the federalism concerns inherent in

public construction and procurement. The amici argue that state and local agencies must be allowed flexibility over labor policy on their own public works projects, and that the National Labor Relations Act ("NLRA") does not preempt local control over such matters.

The amici are sovereign States that own and possess authority over public works projects within their jurisdictions. In addition to the project labor agreements on state and local projects in fourteen states, cited in the Trade Council's petition (No. 91-261), pp. 12-13, n.5 and in the MWRA's petition (No. 91-274), p. 12, the projects set forth in the margin have been completed under project labor

agreements.[1/] Based solely on Congressional silence, the reasoning of the majority opinion below precludes public entities, state or federal, from maintaining the flexibility with regard to public works projects that Congress

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[1/] In the Minneapolis-St. Paul metropolitan area, there have been dozens of recent public works projects that have been completed under project labor agreements, including the following: the Target Center in Minneapolis, the Hubert H. Humphrey Metrodome, the new University of Minnesota Hospital, the Minneapolis Waste-to-Energy Plant, the Minneapolis Convention Center, the Nicollet Mall Project, the Hennepin County Government Center, the St. Paul Civic Center, the Ramsey County Courthouse renovation, and the Seneca, Blue Lake and Empire waste-water treatment facilities. See also Utility Contractors Ass'n. v. Department of Public Works, 29 Mass. App. 726, 565 N.E.2d 459 (1991) ("UCANE") (unless the panel decision below is overturned or substantially modified, Massachusetts will not be able to use a project labor agreement on its Central Artery/Third Harbor Tunnel Project, a $4 billion (Footnote continued on next page.)

has unequivocally given to private property owners.

The States have strong interests in maintaining their ability to conduct public works projects with maximum efficiency through the various options available to private landowners, which include, among other things, project labor agreements. Such agreements may be particularly appropriate on complex projects that require coordinating tasks performed by many different kinds of labor over a long period of time.[2/]

(Footnote continued from previous page.) transportation project over an eight to ten year period).

2/ See UCANE, supra, 29 Mass. App. Ct. at 727, 565 N.E.2d at 460-461 ("such agreements are used to deal with the complexities of major construction projects and typically include standardization of working conditions and mechanisms for resolving disputes without interruption of work").

The States need the flexibility to choose project labor agreements where appropriate, in order to promote efficiency, predictability of cost and a steady and reliable supply of labor on public projects. These types of agreements can resolve jurisdictional disputes between trades in advance, provide for uniform or well-coordinated work rules and schedules, and prohibit strikes. In the absence of project labor agreements like those used in the private sector, many special and complex public works projects risk delays, cost overruns and inefficiencies that have adverse financial and programmatic impacts.

From the financial perspective, the costs of many public projects to the taxpayers and ratepayers are likely to increase unless the States can obtain

project labor agreements promoting labor harmony and, for example, precluding strikes. Contractors' bids are likely to go up, as the bidders take into account the increased risks of delay because of lack of coordination or strikes, as well as the effect of inflation over a longer period of time. Bids would likely reflect the prospect that necessary equipment would have to be rented for a longer period, or that money would have to be borrowed for longer, than would otherwise be necessary. The legal and other costs of dealing with the labor unrest itself would have to be considered. Later sub-bids on the same project may be increased, as they may be submitted at a later date, after additional inflation has occurred.

On a complex public works project, delays often have a compound effect. Particularly on a multi-million or multi-billion dollar project with a firm time schedule, like the Boston Harbor project, one delay may cause further delays if, for instance, a vital piece of special equipment has been leased for a certain time period, but then cannot be used because a strike prevents or delays the necessary preparatory work. If that equipment is in demand, and has been reserved for use elsewhere, it may not be available immediately after a strike is resolved. In addition, construction projects often require a complex sequence of tasks to be performed by one specialized trade after another. Unexpected strikes often destroy the complex scheduling arrangments made by project managers,

causing a chain reaction of delays and increased costs.

In the case of a court-ordered project, delays also involve the prospect of longer non-compliance with law and, from the defendants' perspective, court-ordered fines and penalties. The Boston Harbor project illustrates this danger well. Many other state construction projects designed to remedy violations of laws respecting prisons, mental health or retardation facilities and other programs could be subject to similar delay or exposure to fines or penalties for violation of court orders.

While increased costs to taxpayers and ratepayers are important, delays also directly affect the states' ability to bring needed services to their citizens. On an environmental

improvement project, like the Boston Harbor Cleanup, delays mean more pollution for a longer period of time. Delayed construction of roads and bridges means more traffic congestion, not only due to construction detours, but also because inadequate (or perhaps even dangerous) conditions continue in effect. A host of additional examples illustrate how the States' inability to control construction and to achieve efficiency can postpone the provision of public benefits, such as state-of-the-art hospitals, civic centers and other types of government buildings. The longer some of these projects take, the longer it will take for improved roads, or improved civic centers to have their intended beneficial effect on society and the economy.

The interest of the amici transcends any dispute over the particular content of the project labor agreement in this case. The amici seek to preserve the constitutional balance between the powers of the Federal Government and those of the States, as established by the Constitution. They seek to preserve the States' autonomy and their identities as independent repositories of sovereign authority within our federal system.

In sum, the amici view this case as an important test of their control over labor relations on state and local public works projects. A definitive affirmation of those powers in this case would preserve the constitutional balance of power between the States and the Federal Government and provide guidance to States who wish to exercise

their powers in accordance with principles of federalism.

FACTS

This case concerns a project labor agreement between the project manager on the Boston Harbor pollution abatement project, and the unions and contractors providing labor for the project. In particular, the dispute is over a bid specification known as Specification 13.1, which must be included in all bids for work on the Boston Harbor project. That specification provides that all contractors and subcontractors on the Boston Harbor Project must agree to abide by the project labor agreement signed by Kaiser Engineers, Inc. ("Kaiser") and the Building and Construction Trades Council("Master Labor Agreement").

As described in the District Court's opinion (App. pp. 75a-76a[3/], reproduced in the following paragraphs), the decision to use Specification 13.1 came about after discussions between the project owner, the Massachusetts Water Resources Authority ("MWRA") and the project manager, Kaiser:

"Kaiser, by virtue of its extensive experience on large construction projects and its dealings with hundreds of building trade unions, recognized and understood the need for labor peace and stability on a project of this magnitude. It was aware that the MWRA was operating under court-mandated milestones and it knew of the

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3/ For convenience, the amici cite consistently to the appendix of the MWRA's petition.

significant union presence in the Boston area. A major concern was the location of the work sites and the pressure points at which labor demonstrations could choke the movement of personnel and material. Accordingly, Kaiser recommended to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Council, in an effort to arrive at an agreement which would assure labor stability over the life of the project. Any agreement was subject to review and final approval of the MWRA.

"The MWRA accepted Kaiser's recommendations and in early May, 1989, negotiating teams from the unions and Kaiser met. The Agreement was the result of their negotiations . . .. [T]he MWRA Board of Directors, on May 28, 1989, adopted the Agreement as the

labor policy for the project and directed that Specification 13.1 be added to the bid specification for all new construction work. The purpose was to achieve jobsite labor harmony in order to maintain the court-ordered schedule and avoid the risk of substantial fines for non-compliance. In the absence of such an agreement, legitimate labor disagreements and demonstrations would lead to delays in construction, resulting in increased costs to the MWRA. And, of course, delays will mean that Boston Harbor would continue to be subjected to environmental abuse."

SUMMARY OF THE ARGUMENT

1. The States act as guardians and trustees for their citizens when they contract in their proprietary capacity for the building of public facilities.

In order to fulfill their trust, by providing public works projects in a timely, cost effective and efficient manner, the States have as much need as private landowners to enter into project labor agreements. Since project labor agreements are expressly lawful in the private construction industry, the States must share the same freedoms in their proprietary capacity.

While Congress may displace the States' authority in many areas through legislation, it must do so in a clear statement in the text of the statute itself. There is nothing approaching a clear statement that Congress has mandated intrusion into state sovereignty in this area. On the contrary, the National Labor Relations Act preserves the States' powers over labor relations on public works projects.

2. This Court's decision in Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, 475 U.S. 282, 290 (1986), expressly recognizes that preemption may not apply where the State is responding to legitimate procurement constraints or to local economic needs, or where Congress intended to leave the task to the States. All three of these circumstances apply here. The majority opinion below therefore misapplied Gould in reaching its conclusion.

ARGUMENT

The majority opinion below reads into the National Labor Relations Act implied restrictions on labor relations on state and local government public works projects that do not apply to private projects. Congress has not expressed these restrictions expressly or even by necessary implication. On

the contrary, the NLRA authorizes the state action in question.

By finding preemption so readily here, the Court of Appeals violated the basic tenets of federalism that underlie our Constitution. Gregory v. Ashcroft, 111 S.Ct. 2395 (1991).

1. Congress Meant To Permit, Not To Prohibit, The Use Of Project Labor Agreements On State Projects.

The holding of the majority below wrests control over public construction projects from the States and their subdivisions. As a result, States, public authorities and municipalities have lost flexibility over labor relations on their public works projects. The effects of this lost flexibility are described above in the Interest of Amici section.

In this case, all of the interests at stake implicate the right of the people and their local representatives

to control local public works projects and to choose a labor policy that will best serve the public interest. The principles of federalism apply with full force to a state authority's proprietary interests on its own public works project. While state action is not per se lawful simply because the State is acting as proprietor, it would be contrary to fundamental principles of federalism to hold -- in the absence of any clear statement by Congress -- that a State, as proprietor, has fewer rights

than Congress has expressly given to private contractors.4/

In Reeves, Inc. v. Stake, 447 U.S. 429, 437, 439 (1980), the Court found

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4/ Most discussion regarding the States as proprietors, or as participants in the market, has occurred in the context of the dormant Commerce Clause. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). Cf. United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984) (privileges and immunities clause). It is true that these cases do not address the question of what the States may do, given enactment of the National Labor Relations Act. Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1986). Here, however, the NLRA does not withdraw state authority. Moreover, identifying the scope and purposes of the market participant doctrine sheds considerable light on the interests that are at stake here.

"no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market", and noted that "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis."

Reeves' articulation of the States' "role . . .'" as guardian and trustee for its people"'", 447 U.S. at 438, is instructive here.[5/] The MWRA's

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5/ Reeves was quoting Heim v. McCall, 239 U.S. 175 (1915). In fact, the full quotation from Heim is even more pertinent:

> . . . Atkin v. Kansas, 191 U.S. 207, 222, 223 . . . declared, and it was the principle of decision, that "it belongs to the State, as guardian and trustee for its people, and

(Footnote continued on next page.)

interests bear directly upon the efficient, expeditious and effective completion of the MWRA's sewerage treatment facilities themselves. The MWRA's goal of avoiding the costs of delay, in the form of increased construction costs, potential fines, and environmental harm, falls squarely within its duty to its ratepayers and to the voters to manage its property and purchasing policies so as to achieve the greatest benefit from the Harbor cleanup project at the least cost. It would be a breach of that public trust to subject

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(Footnote continued from previous page.)
having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of municipalities."

Heim, supra, 239 U.S. at 191.

the MWRA's ratepayers to the costs and risks of delay.

Without a compelling congressional direction, the Courts should not conclude that the otherwise lawful project labor agreement became unlawful because of the MWRA's involvement, which in turn arose only because of its strong proprietary interest in timely and cost-effective completion of its sewerage treatment facilities.

Ironically, the MWRA's interests here mirror the concerns that led Congress to authorize project labor agreements for landowners in private industry. As even the majority below acknowledged (App. 24a), Sections 8(e) and 8(f) of the National Labor Relations Act make the Master Labor Agreement "a valid labor contract." The rationale behind these sections applies to public,

as well as private construction, as Congress was concerned about the unique characteristics of the construction industry:

> the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry . . .

App. 39a (Dissenting opinion of Breyer, C.J.), citing S. Rep. No. 187, 86th Cong., 1st Sess. 27-29 (1959).

The MWRA, acting as proprietor of the construction site and of the sewerage facilities, should "share existing freedoms from federal constraints", Reeves, supra, 447 U.S. at 439, that are available to private parties under the NLRA. If MWRA is to share existing freedoms from federal constraints, then it must be allowed to choose clauses that were explicitly

authorized for private industry under sections 8(e) and 8(f) of the NLRA, 29 U.S.C. § 158(e),(f).

While Congress, acting under its constitutionally conferred powers, "may impose its will on the States," "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." Gregory, supra, 111 S.Ct. at 2400.

The majority opinion below intrudes into the States' "substantial sovereign authority", thereby depriving the people of the benefits of decentralized government that underlie the structure of our government:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen

> involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id., 111 S.Ct. at 2399.

The majority opinion below subverts this constitutional scheme by departing from the rule that "'a clear and manifest purpose' of preemption is always required." Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988) (emphasis added). See also Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703, 4706-4707, ___ U.S. ___ (1992); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963) ("In other words, we are not to conclude that Congress legislated the ouster of [a state statute] . . . in the absence of an unambiguous congressional

mandate to that effect.") (emphasis added).

These considerations apply with full force to the NLRA challenge on the present facts. "The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States." Abood v. Detroit Bd. of Education, 431 U.S. 209, 223 (1977). The exemption of the States from the NLRA's definition of employer is strong evidence of congressional intent in this regard. 29 U.S.C. § 152(2).

There are "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." San Diego Bldg. Trades Council v.

Garmon, 359 U.S. 236, 244 (1959); See also Gould, supra, 475 U.S. at 291 ("legitimate response to state procurement constraints or to local economic needs . . ."). The cases demonstrate that the interests at stake here fall within this exception.

Nothing expressed or implied in the NLRA comes close to the type of Congressional statement that warrants preemption. Section 152(2) of Title 29 U.S.C. strongly supports the conclusion that preemption was not intended in the circumstances alleged by ABC. A private landowner in the construction industry has the benefit of Sections 8(e) and 8(f). A State or local agency using its own employees would be exempt from the NLRA under Section 2(2). The MWRA's requirement regarding Bid Specification

13.1 is limited to the "discrete, identifiable class of economic activity in which [it] is a major participant." White, supra, 460 U.S. at 211, n.7. It strains basic principles of federalism and logic to conclude that, without saying so, Congress intended to preempt the Agreement merely because a governmental party is involved.

2. The Gould And Golden State Cases Do Not Warrant Placing Restrictions Upon The States That Congress Has Not Clearly Mandated.

In order to justify its decision to place greater burdens upon governmental employers and developers than upon private companies, the majority below relied on Gould, supra and Golden State,

supra.[6/] Gould did not, however, establish the broad, judge-made preemption that the Court below seems to apply. Gould itself contained limits on the principle it announced, and those limits should be enforced in this case.

Indeed, this Court distinguished the present context from the one in Gould, supra, 475 U.S. at 291:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

See also, Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 618, n.8

[6/] The First Circuit's misapprehension of Gould has been echoed by a divided panel of the Eighth Circuit. See Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367 (8th Cir. 1991). The Sixth and Ninth Circuits have reached the opposite conclusion, as discussed below.

(1985). Instead of using its procurement role to effect a regulatory purpose, here, MWRA is using that role to achieve procurement goals, which fall within the exceptions stated in Gould. See Phoenix Engineering, Inc. v. M-K Ferguson of Oak Ridge Co., F.2d __, 1992 U.S. App. Lexis 13323 (6th Cir. Nos. 91-5577, 91-6358, June 11, 1992), slip. op. at 23-24; Associated Builders & Contractors, Inc. v. City of Seward, ___ F.2d __, 1992 U.S. App. Lexis 12519 (9th Cir. no. 91-35511, June 5, 1992), slip op. at 6323-6324 (upholding City of Seward's authority to require compliance with a project labor agreement under Gould, because of the city's "legitimate management concerns").

In the first place, Congress intended to allow the State to affect labor relations on state public works

projects funded by state agencies on state land. See U.S.C. § 152(2);[7] Abood, supra, 431 U.S. at 223; New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 540-545 (1979).

Second, the District Court's findings regarding the origin of the labor provisions (App. 74a-76a) establish that the Agreement serves at least four important proprietary interests of the MWRA and the Commonwealth: (1) promoting labor peace and stability on the jobsite of a public

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[7] The Act provides that:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . 29 U.S.C. § 152(2) (emphasis added).

works project owned by the MWRA, (2) avoiding the risk of substantial fines against the MWRA for non-compliance with the court-ordered construction schedule, (3) avoiding increased costs to the MWRA in the event of delays caused by labor disputes, and (4) abating pollution of waters of the Commonwealth. As the District Court found, events in the early stages of construction already had proven the need for labor peace and the potential for disruption of the project in the event of labor disputes (App. 74a-75a).

The First Circuit's misapplication of Gould cannot be justified, in light of these findings and the Court's opinion in Gould itself.

CONCLUSION

The injury to our federalist system

effected by the Court below has immediate and concrete consequences. As detailed above, in the Interest of Amici section, States and localities are losing their ability to safeguard their public trust on important public works projects such as the Boston Harbor cleanup. The "States are unable directly to remedy a judicial misapprehension of" Congressional intent regarding the federal-state balance. See Port Authority Trans-Hudson Corp. v. Feeney, 495 S.Ct. 299, 305 (1990) (discussing the Eleventh Amendment).

Unless the Court reverses the judgment below, the States and their subdivisions will be unable to respond effectively to the special conditions in the construction industry -- the very same conditions that led Congress to

authorize project labor agreements on private construction projects. See above, p. 24. Only by reversing the First Circuit's decision can the authority over public projects be returned where it belongs: in the hands of the public officials whose duty it is to serve the public and to carry out the wishes of the people's elected representatives.

This Court should reverse the First Circuit's decision, and remand with instructions to affirm the decision of the District Court.

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